IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 4813 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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THE GUJARAT STATE ROAD TRANSPORT CORPORATION - Petitioner(s)
Versus
RAMESHKUMAR KANTILAL ZAVERI - Respondent(s)

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Appearance :
MR RITURAJ M MEENA for Petitioner(s) : 1,
None for Respondent(s) : 1,
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CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 17/03/2006

ORAL JUDGMENT

1. Heard the learned Advocate, Mr.R.M.Meena, appearing on behalf of the petitioner.

2. In the present petition, the petitioner Corporation has challenged the order passed by Controlling Authority dated 17th February,2005, wherein, Controlling Authority at Nadiad has directed to petitioner to pay the amount of gratuity Rs.3,50,000/- with 10% simple interest, which is due in favour of respondent. This order of Controlling Authority was challenged by petitioner – Corporation before the Appellate Authority, Baroda being Gratuity Appeal No.36 of 2005, wherein, by order dated 5th December,2005, the Appellate Authority at Baroda has confirmed the order of Controlling Authority at Nadiad dated 17th February,2005 and directed the petitioner Corporation to pay Rs.3,50,000/- with 10% simple interest w.e.f. 1st June,2004 to the concerned respondent employee.

3. Learned Advocate, Mr.Meena, has submitted that against the respondent, departmental inquiry was initiated for the misconduct committed in the year 1997-1998 as a Stores Officer. The respondent workman has committed serious irregularities which has resulted into loss to the Corporation of

Rs.2,65,586.34 paisa. Therefore, the petitioner Corporation is entitled to recover the said amount under Section-4 Sub-Section-6 of the Payment of Gratuity Act,1972. He further submitted that unless the amount of gratuity is withheld, how can the Corporation recover the amount of loss from the workman. He also submitted that the petitioner has no other source to recover the said amount from the respondent workman. He also submitted that identical petition had been filed by the Corporation before this Court being SCA No.1322 of 2005, wherein, this Court has issued rule and ad-interim relief in terms of Para.12(C) has been granted. Copy of this order has been placed on record at Annexure-E (Page-13). Except that, no other submission is made by learned Advocate, Mr.Meena and no decision has been relied upon by him in support of his submission.

4. I have considered the submissions made by learned Advocate, Mr.Meena and have also perused the order passed by Controlling Authority as well as Appellate Authority. The facts are that respondent employee has retired from service on 1st May,2004 by

an order dated 30th April,2004 being Divisional Establishment Order No.301 of 2004. The respondent employee was working as a Stores Officer at Divisional Stores at Nadiad. The allegations were made against the workman for the year 1997-1998 and at the time when workman was retired, a departmental inquiry was pending, but no final decision has been taken by petitioner Corporation. The workman demanded amount of gratuity from the Corporation, but same was not paid within a period of one month from the due date. Therefore, workman approached to the Controlling Authority under the provisions of Payment of Gratuity Act,1972. The Controlling Authority has called both the parties to make their submissions. Accordingly, before the Controlling Authority the workman has represented personally and on behalf of Corporation, one Mr.P.M.Vaghela remained present. According to workman, he was appointed on 12th April,1969 and he retired on 30th April,2004. In all, he completed 35 years' service and entitled the amount of gratuity of Rs.3,50,000/-. The petitioner Corporation has not disputed the claim of the workman to receive amount of gratuity of Rs.3,50,000/-, but

contention was raised by Corporation that against the workman, departmental inquiry is pending and, therefore, he is not entitled the amount of gratuity till the completion of departmental inquiry. The Corporation has come out with a case that as and when departmental inquiry will be over, Corporation will take necessary steps to make the payment of gratuity amount to the workman. The financial condition of the Corporation is not good and, therefore, a request was made to dismiss the application filed by the workman. The contention raised by Corporation before the Controlling Authority that respondent was working as a Stores Officer and, therefore, he is not come within the definition of “employee” under the Payment of Gratuity Act,1972. But that contention was rejected by Controlling Authority considering the amendment in the Payment of Gratuity Act in the year 1984 and 1994. Therefore, according to Controlling Authority, the respondent is covered by definition of Section 2(e) as an “employee”. However, that contention was not raised before this Court by the Corporation accepting that finding. Apart from that, recently this Court has taken the view that Works

Manager is also covered by definition of Section 2(e) under the Payment of Gratuity Act in case of Lalit D.Thakkar Vs. Controlling Authority and Assistant Labour Commissioner, Surat reported in 2006 Lab.I.C. 615, (Coram : K.A.Puj,J.). Therefore, now it is not necessary to further examine the said question.

5. Before the Controlling Authority written statement was filed by Corporation on 27th January,2005 raising the same contention in reply and also pointed out one Circular dated 11th January,2005 of the Corporation. The Controlling Authority has considered that according to Circular dated 11th January,2005, the inquiry is required to be completed within a period of 1 year when Default Report No.8 of 2003 was received by Corporation. But, Corporation has not completed departmental inquiry upto December,2003 and served the charge-sheet on 21st April,2004 before 10 days of retirement. The Controlling Authority has considered Section 4 Sub-section 6, wherein, employer having certain powers to withhold the amount of gratuity, but Controlling authority has come to conclusion that when workman

retired from service on 30th April,2004, there was no punishment order passed by competent authority against him. It is not a case of termination by the employer. Therefore, this Section is not applicable and on that ground alone, amount of gratuity cannot be withheld by Corporation. Therefore, accordingly, Controlling authority has passed an order on 17th February,2005.

6. In appeal also, same contention was raised by Corporation in addition to one fact that during the pendency of this appeal, the Corporation has passed the punishment order dated 14th July,2005, wherein, the Corporation is required to recover the amount from respondent of Rs.2,65,586.54 paise. Except that, no additional contention was raised by the Corporation before the appellate authority. The appellate authority has also considered the contention that respondent is not an employee within a meaning of Section 2(e) of the Payment of Gratuity Act,1972. The appellate authority has considered the amendment of 1984 and 1994 and come to conclusion that respondent is an employee covered within the

definition of Section 2(e) of the Payment of Gratuity Act,1972. In respect to power of the employer to withhold the gratuity under Section 4 sub-section 6, the appellate authority has come to conclusion that there is no termination order passed by employer and before retirement, punishment order is also not passed and workmen has retired on 30th April,2004. Therefore, in such circumstances, there is no provision under the Payment of Gratuity Act,1972 which gives right to employer to withhold the amount of gratuity. Against the punishment order, appeal is filed by the workman before the appellate authority which is pending and, therefore, the appellate authority come to conclusion that once the Corporation has given clearance certificate at the time of retirement by all the departments including Account Department, Traffic Department, Security Department and Stores Department and that no amount has remained due against the Corporation of the employee, therefore, the appellate authority has come to conclusion that under Section 7, workman is entitled the amount of gratuity within a period of one month from the date of retirement, which is not

paid and withheld by Corporation without any authority of law and Section 4 Sub-Section 6 is not applicable to the facts of this case.

7. I have considered the submissions made by learned Advocate, Mr.Meena as well as the observations made by both the lower authorities. In respect to the contention that respondent is not covered by definition of “employee” under Section 2(e) of the Payment of Gratuity Act,1972, the view taken by this Court in case of Lalit D.Thakkar (Supra), this Court has observed that Works Manager and Managerial function is squarely covered within the definition of an employee as given in Section 2(e) of the Act. Therefore, that contention is rejected by this Court relied upon by the authority as well as considering the two amendments made in Payment of Gratuity Act in the year 1984 and 1994. The second contention about applicability of provisions of Section 4 Sub-Section 6, which is quoted as under :

“**Sub-Section-6**

Notwithstanding anything contained in sub-

section (1)-

(a) the gratuity of an employee, whose services have been terminated for any act, willful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused;

(b) the gratuity payable to an employee [may by wholly or partially forfeited]-

(i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or

(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment.”

7.1 This Sub-Section gives power to the employer and authorized to withhold the amount of gratuity when service has been terminated for any act, willful omission or negligence causing any damage or loss to, or destruction of property, belonging to employer.

But, in this case there is no similar facts. Here petitioner Corporation has not terminated the service of workman and no decision of termination has been taken by the Corporation. On the contrary, workman retired from service as permitted by Corporation on 30th April,2004. The Corporation has issued no due certificate from each Department of Corporation. Therefore, considering the provision of this Section, corporation is not authorized to forfeit or withhold the amount of gratuity till the departmental inquiry is over against the workman. Against the punishment order dated 14th July,2005 the respondent workman has filed departmental appeal which is pending before the appellate authority. Therefore, according to my opinion, the controlling authority as well as appellate authority have rightly come to conclusion that because of the pendency of departmental inquiry, amount of gratuity cannot be withheld by employer. Similar view has been taken by this Court in case when criminal prosecution is pending or departmental inquiry is pending, which would not entitle the employer to forfeit the gratuity of the employee. In case of GSRTC Vs. Devendra Mulvantri Vaidya reported

in 2006 I LLJ 324, the Division Bench of this Court in para.3 has observed as under :

> 3. Sub-section (6) of Section 4 of the Payment of Gratuity Act, 1972 says that the gratuity of an employee shall be forfeited to the extent of damage or loss so caused if the services of such employee has been terminated for any act, wilful omission or negligence causing any damage or loss to or destruction of, property belonging to the employer. For application of this clause, the first submission should be that the services of the employee has been terminated for any act, wilful omission or negligence causing any damage or loss to or destruction of, property belonging to the employer. In the present case, the appellant does not say that for any such misconduct as provided in clause (a) of sub-Section(6), the services have been terminated. So far as clause (b) of Sub-section (6) is concerned, it provides that the gratuity payable to an employee may be wholly or partially forfeited if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part or if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the

course of his employment. It is not the case of the appellant that the employee has been terminated for his riotous or disorderly conduct or any other act of violence or he has been terminated for an act which constitutes an offence involving moral turpitude. If the employee/workman was allowed to retire after completing about 38 years on reaching the age of superannuation,then the provisions contained in sub-section (6) of Section 4 would not apply. Before the learned Single Judge, the fact was not disputed that the respondent workman was allowed to retire. Pendency of the criminal case or the departmental enquiry would not entitle the appellant Establishment to forfeit the gratuity either wholly or in part if the employee has not been terminated under the provisions of sub-section (6) of Section 4 of the Act. So far as the judgment of the Supreme Court in the matter of Calcutta Insurance Ltd.(supra) is concerned, we must immediately observe that the reliance placed on the judgment is misconceived. In the said matter, considering the case where an employee voluntarily resigned and brought about termination of his service the Apex Court made such observations. Present is not a case of that nature. In the present matter, the employee was allowed to retire on completion of 38 years on attaining

> superannuation. The submissions made by the appellant are misconceived. They deserve to and are accordingly rejected. The appeal is dismissed. Consequently, Civil Application for stay is also dismissed."

8. In the said decision, both the contingencies have been taken into account by Division Bench; one is pendency of criminal case or departmental inquiry. Therefore, question which has been raised by learned Advocate, Mr.Meena, is answered by the Division Bench of this Court. Therefore, the reliance which has been placed by learned Advocate, Mr.Meena, in one identical petition being SCA No.1322 of 2005 which has admitted by this Court on 3rd February,2005 and ad-interim relief granted is confirmed by this Court on 20th January,2006. Copy of that interim order is placed on record. The contention of learned Advocate, Mr.Meena, is not accepted by this Court only on the ground that when Rule was issued in SCA No.1322 of 2005 on 3rd February,2005, but decision given by Division Bench on 5th May,2005 i.e. subsequent to admitting the matter by this Court. Merely rule has been issued is not enough, but here Division Bench has already examined the matter on the same issue and

decided in the case of Corporation itself. Therefore, contention raised by learned Advocate, Mr.Meena, is not accepted and same is rejected.

9. In view of the above observations, according to my opinion, both the authorities have rightly decided and examined the matter. For that, none of the authorities have committed any error which require interference by this Court. This Court cannot act as an appellate authority and re-appreciate the evidence which was led before the Controlling authority. In case even two views are possible, even though this Court has no jurisdiction to interfere with such matter. Therefore, considering the entire facts which are on record, according to my opinion, both the authorities below have not committed any error which require any interference by this Court while exercising powers under Article 227 of the Constitution of India. Hence, there is no substance in the present petition. Present petition stands dismissed with no order as to costs.

10. It is directed to Controlling Authority and

Assistant Commissioner of Labour, Nadiad to pay amount of gratuity of Rs.3,50,000/- with 10% simple interest as deposited by GSRTC through Divisional Controller, Nadiad in pursuance to order dated 17th February,2005 in favour of respondent – Rameshkumar Kantilal Zaveri by an Account Payee Cheque after proper verification immediately without any delay.

(H.K.Rathod,J.)

(vipul)